No. 86-1563

In the Supreme Court of the United States

OCTOBER TERM, 1986

LOUIS GNIOTEK, CARMEN CHRISTY, LEONARD GARRIS, DAVID SOFRONSKI, AUGUSTINE PESCATORE, and FRATERNAL ORDER OF POLICE, LODGE NO. 5,
Petitioners

v.

CITY OF PHILADELPHIA, W. WILSON GOODE, LEO BROOKS, GREGORE J. SAMBOR, ANDREAS HANTWERKER, JOHN STRAUB and BARBARA MATHER,
Respondents

Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In 1984, some fifteen police officers in the City of Philadelphia Police Department (hereinafter, the "City" or the "Department") were indicted on federal charges of bribery and corruption under the R.I.C.O. Act in connection with the performance of their police duties. The criminal trials for those officers were bifurcated into two proceedings, *U.S. v. Martin* and *U.S. v. Volkmar,* Cr. No. 84-106 (E.D. Pa.). During the lengthy hearings in those matters, Petitioners Gniotek, et al. (hereinafter, "Petitioners" or "Gniotek, et al.") were identi-

fied by fellow officers, or others appearing under oath as witnesses for the prosecution, as also the recipients of unlawful bribes. Those witnesses testified that each Petitioner had received bribes from them or other known vice operators in Philadelphia for several years. The witnesses further testified that Petitioners had accepted this money in return for their promise not to enforce various vice laws of the Commonwealth of Pennsylvania. Though these witnesses appeared under a grant of immunity from the United States Attorney's Office, that immunity did not protect them against prosecution for perjury. At the trial, their testimony was credited by the jury which convicted all of the police defendants in that matter.

During the *Martin* proceedings, prosecution witness Eugene Boris, a former police officer, testified that while assigned to the Fifth Police District, Petitioner Louis Gniotek regularly accepted money from him to protect illegal numbers writers from arrest. Petitioners Garris, Christy and Pescatore were similarly identified as the regular recipients of bribes from Albert Ricci, a defendant in that case, who pleaded guilty to the charges against him. Former Police Lieutenant Joseph Alvaro corroborated those allegations against Garris, Christy and Pescatore by testifying that he knew each to have been the recipient of payments from vice figures while he worked with them in the Philadelphia Northwest Police Division Vice Squad. Petitioner Sofronski was identified by Robert Sadowl, an admitted vice figure. Sadowl testified that he made payments directly to Sofronski to permit the operation of illegal poker machines within Sofronski's assigned district.

The proceedings in the *Martin* trial were monitored daily by officers from the Police Department. When testimony was offered stating that a current police officer had engaged in corrupt conduct, his name and the facts regarding his activities were transcribed and brought to the immediate attention of the Police Commissioner by those officers assigned to the courtroom.

The Commissioner considered the testimony of the aforementioned witnesses very reliable because it was offered un-

der oath, in open court, by witnesses on behalf of the federal government. He further believed the United States Attorney's Office acted in good faith in presenting testimony about officers who were not indicted as part of the government's case, that the testimony was truthful and, most importantly, that it was accepted as truthful by the court.

Following the Commissioner's review of the testimony, each Petitioner was instructed to report with his Commanding Officer to Inspector Andreas Hantwerker, Chief of the Department's Ethics and Accountability Division (E.A.D.).[1] Each reported individually with his attorney at a designated time. At their E.A.D. interview, each was immediately notified by Inspector Hantwerker and Deputy City Solicitor John P. Straub[2] that he had been identified in federal court testimony as the recipient of illegal bribes in connection with the performance of his duties. They were further advised that as a result of that testimony they were now the subjects of a criminal investigation. Each Petitioner was immediately given his *Miranda* warnings by Inspector Hantwerker. Next, each was asked whether he desired to give a statement concerning the departmental and criminal charges pending against him. In response to that question, Petitioners chose to remain silent on advice of counsel. Each Petitioner then signed a statement confirming his understanding of the *Miranda* warnings and his corresponding decision to remain silent. After signing their statements, Petitioners received a written Notice of Suspension with Intent to Dismiss for the conduct described above. Petitioners were then placed immediately on suspension. (Petitioners' Appendix B at 15a).

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1. The Ethics and Accountability Division acts as the Department's own check on the ethics of all officers' activities and on the general propriety of police conduct. It is charged with the receipt of complaints regarding officers and the investigation of improper conduct. It is not related to the Philadelphia District Attorney or any other prosecutorial agency.

2. The Philadelphia City Solicitor's Office is not a prosecutorial agency. Rather, it represents the City in civil matters, and provides legal advice to the City's departments and agencies, including the Police Department. Philadelphia Home Rule Charter §§4-400, 8-410.

Several days later, Petitioners each received a Notice of Intent to Dismiss which outlined again the facts relating to the trial court testimony and specified the various departmental directives and policies which they violated. The Notices included a statement advising the recipient of his right under the Philadelphia Civil Service Regulations to notify the Police Commissioner in writing within ten (10) days of receipt of the Notice of any reason which in his belief indicated that his intended dismissal was unjustified. No such letter was received by the Commissioner or the department's personnel director from any of the Petitioners within that ten day period. Consequently, Petitioners were dismissed from the Department for the reasons set forth in the Notice of Intent to Dismiss.

In depositions taken during discovery, each Petitioner testified that he believed the exclusive reasons for his dismissal to be the reasons enumerated in the Notices of Intent to Dismiss and Notices of Dismissal relating to violation of department policies. Petitioners further admitted that they did not believe that their dismissals were in any way related to *Miranda* warnings or their invocation of their Fifth Amendment rights. (Petitioners' Appendix B at 23a).

Through their collective bargaining representative, the Fraternal Order of Police (hereinafter, the "FOP"), Petitioners initiated separate grievances challenging their dismissals from the Department. The grievances were filed pursuant to the FOP Collective Bargaining Agreement with the City. Under that Agreement, Petitioners had the right to request a first-level hearing before the Police Commissioner himself. All Petitioners waived that right in favor of submitting their grievances to binding arbitration with the American Arbitration Association, an option also available under the FOP Agreement. Hearings for all the individual grievants were consolidated before Arbitrator Eli Rock.

At the arbitration proceeding, the City produced former Officer Albert Ricci, who testified that he had passed bribe monies from various vice figures to Petitioners Garris, Christy and Pescatore. (Petitioners' Appendix C at 62a). The

City also produced the testimony of former Vice Lieutenant Joseph Alvaro, who corroborated Ricci's testimony. *Id.*

On November 25, 1986, Arbitrator Rock issued an Opinion and Award sustaining the dismissal of Petitioners Garris, Christy and Pescatore, tabling the grievances of Officers Gioffre, Sullivan, Schwartz and Stansfield[3] and ordering the conditional reinstatement of petitioners Sofronski and Gniotek. The FOP subsequently appealed the portion of the Arbitrator's Award denying the grievances of Garris, Christy and Pescatore to the Philadelphia Court of Common Pleas. Similarly, the City appealed that portion of the Award requiring the conditional reinstatement of Sofronski and Gniotek to Common Pleas Court. Those appeals are currently pending.

In April 1985, Petitioners filed the instant action in the United States District Court for the Eastern District of Pennsylvania pursuant to 42 U.S.C. §§1983, 1985, 2201, the Fifth and Fourteenth Amendments, and various sections of the Commonwealth of Pennsylvania Constitution. In their Complaint, Petitioners alleged that the City of Philadelphia and several City officials violated their rights to due process of law regarding their dismissals from their positions with the Philadelphia Police Department and denial of pensions benefits. On May 13, 1985, the City filed a Motion to Dismiss or in the Alternative for Summary Judgment on nine different grounds. A Cross-Motion for Summary Judgment was then filed by Petitioners, with an *amicus curiae* appearance by the American Civil Liberties Foundation (hereinafter, "ACLF"), and a Reply Brief by the City. On March 6, 1986, Judge Raymond J. Broderick granted the City's Motion by:

1) dismissing Petitioners' §1985 claim,

2) dismissing Petitioners' claim regarding pension benefits,

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3. Officers Gioffre, Sullivan, Schwartz and Stansfield were parties to the instant litigation in the District Court, but not to the present appeal. Prior to their appeal to the Third Circuit, Gioffre, Sullivan and Schwartz were indicted and convicted of similar R.I.C.O. charges. (Petitioners' Appendix B at 17a).

3) granting summary judgment against Petitioners' procedural due process claims,

4) granting summary judgment against Petitioners' Fifth Amendment claim,

5) granting summary judgment against Petitioners' State law claim that they were not dismissed from their jobs for "just cause."

(Petitioners' Appendix B).

After entry of the District Court's decision, Petitioners perfected an appeal to the Third Circuit Court of Appeals raising only the procedural due process and the Fifth Amendment issues. (Petitioners' Appendix A at 4a).

After receipt of Briefs by Petitioners, the City, and the ACLF as *amicus curiae* and oral argument, the Third Circuit issued an Opinion on December 24, 1986 affirming the District Court's grant of the City's Motion for Summary Judgment and held that the City provided Gniotek, et al. with adequate pre-deprivation due process.[4] (Petitioners' Appendix A). Petitioners now seek the instant Writ of Certiorari in the United States Supreme Court.

SUMMARY OF ARGUMENT

The instant Petition for Writ of Certiorari should be denied because Petitioners never raised before the Court of Appeals their argument that the City did not follow its "standard procedure" with regard to them. Further, Petitioners never raised on appeal their argument that the pre-deprivation opportunity to respond afforded them was a "custodial interrogation" which did not satisfy the due process requirement of *Cleveland Bd. of Educ. v. Loudermill.* In addition, the

4. The District Court made no specific ruling in its Opinion regarding Gniotek, et al.'s pre-suspension due process rights vis-a-vis their termination due process. The Third Circuit specifically held that Gniotek, et al. were entitled to notice and an opportunity to respond prior to suspension as well as termination, but held that the procedure described herein was adequate and constitutional for both the suspension and termination of Petitioners.

instant Petition should be denied because no conflict among the Circuit Courts exists regarding the Third Circuit's interpretation of *Loudermill,* and the facts of this case are too narrow to warrant a constitutional analysis by this Court. Finally, the Petition should be denied because the Third Circuit did not misapply this Court's prior holdings in *United States v. Rylander* and *Williams v. Florida.*

ARGUMENT

I. Petitioners Never Raised On Appeal The Question Of Whether The City Failed To Follow "Standard Procedure" For Confronting And Investigating Officers Accused Of Criminal Misconduct.

The long established policy of this Court is to refuse to hear or decide issues which petitioners have failed to raise before in the Court of Appeals. *Neely v. Eby Construction Co.,* 386 U.S. 317, 330, 18 L.Ed.2d 75, 85 (1967). This practice has been defined by the Court itself as "our normal policy of not considering issues which have not been presented to the Court of Appeals," *id.,* and has been applied many times over to arguments and theories raised on appeal to the Supreme Court but not in the courts below. *Neely, supra; Cort v. Ash,* 422 U.S. 66, 73, n.6, 45 L.Ed.2d 34, n.6 (1975). *See Miree v. DeKalb County,* 433 U.S. 25, 34, 53 L.Ed.2d 557, 566 (1977); *United States v. Lovasco,* 431 U.S. 783, 788, n.7, 52 L.Ed.2d 752, 758, n.7 (1977).

In their Petition for Certiorari, at pages 11-14, Petitioners argue that the City's Police Department failed to follow, with regard to Petitioners, its "standard investigative procedures" when officers are accused for disciplinary purposes of criminal misconduct. Such a theory includes far more than the self-incrimination and *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), procedural due process issues described by the Third Circuit as the only issues raised by Petitioners for review. (Petitioners' Appendix A at 4a). Indeed, the Third Circuit's entire Opinion is predicated upon those narrowly defined issues and no

other. Nowhere in their briefs to that Court or in oral arguments did Petitioners attempt to focus the Court on the issue of whether the District Court erred by not finding that the City failed to apply "standard procedure" in investigating the allegations of criminal misconduct proffered against them. (Petitioners' Appendix A). Had such an issue been raised, the court below might have been required to make an equal protection analysis; or at the very least, remand to the District Court for additional findings of fact. However, in the absence of Petitioners raising that issue, the Third Circuit could not and did not determine the merits of that issue.

Therefore, because Petitioners have newly raised an issue not presented by them for review before the Court of Appeals, this Court should follow its normal practice of rejecting Petitioners' request that this matter be reviewed by this Court. *See Neely, supra; Cort v. Ash, supra.*

II. Petitioners Never Raised On Appeal Their Theory That The *Loudermill* Pre-Deprivation Opportunity To Respond To The Accusations Against Them Was In Reality A "Custodial Interrogation" Which In And Of Itself Could Not Satisfy The *Loudermill* Due Process Requirements.

In their Petition for Writ of Certiorari, Petitioners expound at great lengths their theory that the E.A.D. interview with the Police Inspector was in reality a criminal "custodial interrogation" which, *arguendo,* could not be a meaningful administrative pre-deprivation opportunity to respond under *Loudermill.* This theory, however, goes beyond any of the arguments preserved by Petitioners before the Court of Appeals. (Petitioners' Appendix A).

In its Opinion, the Third Circuit took note of the only two issues pressed by Petitioners regarding the sufficiency of the E.A.D. interview as a pre-deprivation opportunity to respond under *Loudermill.* The Court summarized those issues as (1) whether a meaningful opportunity to respond was afforded Petitioners where their responses might have been used against them because they were the subjects of a criminal

investigation, and (2) whether the City unconstitutionally burdened their right against self-incrimination by forcing them to choose between responding to the charges or losing their job. (Petitioners' Appendix A at 9a). Nowhere did the Third Circuit indicate that it had been asked to review the question now posed of whether the E.A.D. interview was in reality a criminal "custodial interrogation" which by its very nature could not be an administrative disciplinary pre-deprivation opportunity to respond.[5] As a result of Petitioners' failure to raise this theory, the Third Circuit's Opinion addresses only the self-incrimination aspects of the E.A.D. interview, and not the newer question raised in the instant Petition that a "custodial interrogation" could not "serve as an employment termination hearing." (Petition for Writ of Certiorari at 15).

Therefore, because Petitioners raise a new issue on appeal which was not raised before the Court of Appeals, this Court should reject that issue from the instant matter. *Neely, supra; Cort v. Ash, supra.*

III. No Conflict Exists Among The Circuits Regarding The Third Circuit's Interpretation Of *Loudermill* And Public Employees' Rights Under The Fifth Amendment.

Historically, the Supreme Court has obligated itself to avoid deciding constitutional issues except where "avoidance becomes evasion." *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74, 99 L.Ed. 897, 901 (1954). *See Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 341, 80 L.Ed. 688, 707 (1936). This Court has noted, however, that it will grant certiorari where a particular case would allow it to resolve decisions among the Courts of Appeals which are in conflict. *Stellos Co. v. Hosiery Motor-Mend Corp.,* 295 U.S. 237, 238-39, 79 L.Ed.

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5. The ACLF in their brief before the Third Circuit did argue the above theory. However, as *amicus curiae,* the ACLF was not a party to the proceedings or appeals below. *International Union v. Scofield,* 382 U.S. 205, 15 L.Ed.2d 272 (1965).

1414, 1416 (1935); *International Union v. Scofield,* 382 U.S. 205, 15 L.Ed.2d 272 (1965).

In the instant Petition for Writ of Certiorari, Petitioners have nowhere alleged that the decision of the Third Circuit is in any way inconsistent with decisions among the other Circuits regarding procedural due process under *Loudermill* or the right against self-incrimination in pre-deprivation hearings. Quite the contrary, the Third Circuit's decision is the first among the Circuits concerning these issues since this Court's decision in *Loudermill* in 1985. In the absence of such conflict, this matter does not warrant the expenditure of this Court's resources. Therefore, the instant Petition for Writ of Certiorari should be denied. *See S.S. Montrosa v. Carbon Black Export, Inc.,* 359 U.S. 180, 3 L.Ed.2d 723 (1959).

IV. The Facts Of This Matter Are Far Too Narrow To Warrant Interpretation By This Court.

This Court has cautioned that it should avoid deciding federal questions which arise merely in an "episodic" context. *Rice v. Sioux City Cemetery,* 349 U.S. at 74, 99 L.Ed. at 901. The facts of this matter are clearly so singular as to have little or no potential impact on other Circuits should this Court render a full opinion. As set forth fully in both Petitioners' and the City's Statements of the Case, this matter involves the unusual situation where police officers were named by live witnesses in a court proceeding, to which they were not parties, as the recipients of illegal bribes. More particularly, this case concerns police officers charged in an administrative context by their employer, a law enforcement agency, with misconduct of a criminal nature. This unfortunate situation was generated only by the unique nature of the Police Department's role as the employer of persons charged with high ethical standards and enforcing the law.

This Court's Opinion in *Loudermill* acts as a guide for all government employers, including Police Departments, on the necessity of providing pre-deprivation notice and an opportunity to respond. The Third Circuit clearly evaluated the instant E.A.D. interview under the guidelines of *Loudermill* and

determined that the constitutional rights of Petitioners were protected. An additional decision by this Court, addressing solely the unique facts of this case would simply duplicate this Court's efforts in articulating the due process rights of public employees already stated in *Loudermill* and add little in the way of insight for the Circuit and District Courts.

Therefore, because the factual situation in this matter is so unique, this Court should avoid employing its judicial resources in reviewing a matter of narrow scope and significance.

V. The Third Circuit Did Not Create An Unlawful Distinction Between This Court's Decisions In *Garrity v. New Jersey, United States v. Rylander,* Or *Williams v. Florida.*

Petitioners contend that the Third Circuit has created an impermissible distinction in its Opinion between *Garrity v. New Jersey,* 385 U.S. 493, 17 L.Ed.2d 562 (1967) and *United States v. Rylander,* 460 U.S. 752, 75 L.Ed.2d 521 (1983) and *Williams v. Florida,* 399 U.S. 78, 26 L.Ed.2d 446 (1970). This theory, however, is not supported by the record from the courts below or by a correct interpretation of the Third Circuit's Opinion in this matter.

In *Garrity, supra,* police officers were accused of criminal misconduct with regard to matters occurring in New Jersey Municipal Courts. During the Attorney General's investigation, the officers were advised that they had the right to remain silent, that anything they said could be used against them, and that if they refused to answer questions they would be subject to removal from office. *Id.* at 494, 17 L.Ed.2d at 564. The officers answered the questions, but with no specific grant of immunity. Their statements were subsequently used by the prosecution in the criminal trial against them. On appeal, this Court considered only the question of whether those statements were properly admissible as evidence against them in that criminal proceeding. The Court held that:

> . . . the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

Id. at 500, 17 L.Ed.2d at 567.

The *Garrity* decision prohibited the use of coerced statements as evidence against a public employee in a criminal matter regarding his official duties. The Court, however, focused more directly on a public employer's right to know what his employees have done in performing their duties in two subsequent Opinions. *Gardner v. Broderick,* 392 U.S. 273, 20 L.Ed.2d 1082 (1968), analyzed the public employer's rights vis-a-vis its employee's right against self-incrimination. In that case, a New York City policeman was dismissed when he refused to *waive* his privilege against self-incrimination upon being summoned to appear before a Grand Jury investigating police bribery and corruption. On appeal, this Court reviewed the specific question of whether a State may discharge an employee for refusing to *waive* his Fifth Amendment rights. In its Opinion, this Court readily held that a coerced waiver of immunity unlawfully infringed on the patrolman's right against self-incrimination. *Id.*

In a companion decision to *Gardner, Uniformed Sanitation Men Assoc. v. Commissioner,* 392 U.S. 280, 20 L.Ed.2d 1089 (1968), this Court further described the unconstitutionality of dismissing employees for refusing to waive their right against self-incrimination. In that matter, public employees were similarly summoned to give testimony before a Grand Jury. At that time, they were asked to sign waivers of immunity, but refused to do so. On review, this Court stated that the employees were dismissed, not merely for refusing to answer questions regarding their conduct as public employees, but for refusing to waive their constitutional right against self-incrimination. *Id.* at 283, 20 L.Ed.2d at 1092. Again, this Court held that such a coercive waiver of immunity was unconstitutional. *Id.* at 285, 20 L.Ed.2d at 1093.

In both *Gardner, supra,* and *Uniformed Sanitation Men, supra,* this Court noted that an employee's refusal to answer questions specifically related to charges of misconduct, without a requirement that he waive his immunity against self-incrimination, could alone be sufficient reason for discharge from public employment. Specifically, in *Gardner* this Court noted that:

> If appellant, a police officer, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, *without* being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey, supra,* the privilege against self-incrimination would not have been a bar to his dismissal.
>
> (Emphasis added).

Id. at 287, 20 L.Ed.2d at 1086-87.

Again, in *Uniformed Sanitation Men,* this Court held that:

> If [the State] had demanded that Petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment *without* requiring relinquishment of the benefit of the constitutional privilege [against self-incrimination], and if they had refused to do so, this case would be entirely different—[for] petitioners being public employees subject themselves to dismissal if they refuse to account for their performance of their public trust . . .
>
> (Emphasis added).

Id. at 284-85, 20 L.Ed.2d at 1093. *Accord, Lefkowitz v. Turley,* 414 U.S. 70, 38 L.Ed. 2d 274 (1973).

In its decision, the Third Circuit was fully cognizant of the restrictions under *Garrity* and the impermissible request under *Gardner,* that an employee waive his right against self-incrimination. At footnote 7, the Court correctly noted that in *Gardner* and *Garrity,* the public employers unlawfully trod on

their employees' constitutional rights by dismissing them for asserting that privilege. (Petitioners' Appendix A at 10a). However, such could not have been the case of Gniotek, et al., for Judge Broderick in his Opinion at the District Court found as a matter of fact that:

> ... there is nothing in this record indicating that the plaintiff officers were dismissed because they asserted their fifth amendment privilege. Seven of the nine plaintiff officers have stated in depositions that they do not believe that they were dismissed for asserting their fifth amendment privilege.
>
> (Petitioners' Appendix B at 23a).

In addition, the Notices of Intent to Dismiss stated only that the reasons for their dismissal related to the charges of bribery and other illegal conduct. (Petitioners' Appendix B at 47a-49a). Further, Judge Broderick noted that the Police Commissioner stated in deposition that Gniotek, et al. were terminated only because of the evidence of bribery. *Id.*

With no evidence in the record to show that plaintiffs were in fact discharged for asserting their Fifth Amendment privilege, and with no evidence that they were coerced into waiving that privilege, the Third Circuit correctly analyzed this matter as one in which Petitioners were unwilling to rebut the evidence offered at their E.A.D. interviews of their receipt of bribes. (Petitioners' Appendix A at 8a, 10a, n.7).

Though not arising in the context of employee relations or disciplinary hearings under *Loudermill,* this Court's Opinions in *Williams v. Florida, supra,* and *Rylander, supra,* state the important principle that the Fifth Amendment is not a substitute for concrete evidence in one's defense. In *Rylander, supra,* this Court specifically held that where a defendant has the burden of production with regard to his defense, a claim of privilege under the Fifth Amendment "is not a substitute for relevant evidence" to meet that burden. *Id.* at 761, 75 L.Ed.2d at 530-31.

Similarly, in *Williams v. Florida, supra,* this Court held that in the criminal context, a State law requiring that a

criminal defendant give notice to the prosecution of an alibi defense is not unconstitutional under the Fifth Amendment. This Court notably held that:

> . . . a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.

Id. at 84, 26 L.Ed.2d at 451.

Both *Williams v. Florida, supra,* and *Rylander, supra,* are consistent with the dicta of this Court in *Gardner* and *Uniformed Sanitation Men* that a public employer may dismiss an employee who refuses to answer to charges against him related to the performance of their official duties. *Gardner,* 392 U.S. at 278, 20 L.Ed.2d at 1086-87; *Uniformed Sanitation Men,* 392 U.S. 284-85, 20 L.Ed.2d at 1093. *Accord, Lefkowitz,* 414 U.S. at 84, 38 L.Ed.2d at 285-86. In the case of Gniotek, et al., each chose to remain silent and offer no rebuttal in the face of the heinous charges of bribery. With absolutely no rebuttal from their own lips regarding those charges, the City of Philadelphia had no choice but to discharge them from their duties.[6]

Furthermore, even if Petitioners were incorrectly given their *Miranda* rights in the context of their *Loudermill* opportunity to respond, their rights against self-incrimination were not abridged, for this Court's decisions in *Garrity,* and *Gardner,* stand for the clear proposition that any statements which they might have offered could *not* have been used against them in later criminal proceedings. Thus, immunity for statements which they might have offered to rebut the charges for bribery existed whether or not the City actually offered it. *See Hester v. City of Milledgeville,* 777 F.2d 1492 (11th Cir., 1985). Had Petitioners responded to save their jobs,

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6. As discussed above, Petitioners assert that the E.A.D. interview was not a *Loudermill* opportunity to respond, but a "custodial interrogation". However, as discussed *supra,* that issue was not raised before the Court of Appeals.

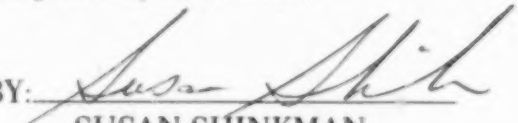
those statements could not have been used against them in any criminal proceeding. *Garrity, supra.*

Therefore, the Third Circuit did not carve an unlawful distinction between the instant matter and *Garrity* and *Rylander, supra.* Quite the contrary, the Third Circuit analyzed those decisions correctly by holding that Petitioners had the absolute right to remain silent in the face of the incriminating evidence of bribery brought against them. Their decision to remain silent resulted in them offering no evidence which could be weighed in their favor in the face of those serious charges of bribery. In that holding, the Third Circuit consistently and accurately construed this Court's precedent regarding the right against self-incrimination, *Garrity, supra,* the consequences of the failure to offer contrary evidence, *Williams v. Florida, United States v. Rylander,* and the authority of the public employer to terminate employees who fail to respond to evidence of misconduct, *Gardner, supra, Uniformed Sanitation Men, supra.* In view of the Third Circuit's well reasoned interpretations of this Court's Opinions, the instant Petition should be denied.

CONCLUSION

Therefore, because Petitioners have raised issues on appeal which they did not raise before the appellate court below, because they have proffered no evidence that the decision of the Third Circuit is inconsistent with other Circuit Courts, because the facts of this matter are too narrow to warrant broad review by this Court, and because the Third Circuit did not incorrectly apply this Court's prior decisions in *Garrity*, *Rylander* and *Williams v. Florida*, Respondents respectfully request the instant Petition for Writ for Certiorari be denied.

Respectfully submitted,

BY: 

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